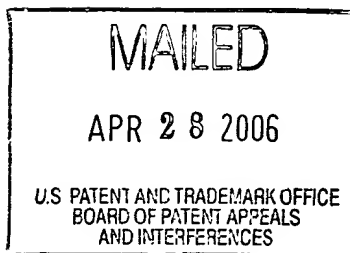


The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE



BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVID C. MAY

Appeal No. 2006-1309
Application No. 09/166,625

ON BRIEF

Before KIMLIN, WARREN, and WALTZ, Administrative Patent Judges.
KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 3-10 and 12-17. Claim 1 is illustrative:

1. A drop cloth for covering a surface, comprising:

a first layer having a non-woven fabric material, said non-woven fabric material including natural fibers; and

a second layer attached to said first layer, said second layer having a liquid impervious plastic material;

wherein said first layer has a thickness;

wherein said thickness is in the range of 1 to 2 mils.

Appeal No. 2006-1309
Application No. 09/166,625

The examiner relies upon the following references as
evidence of obviousness:

Mobley	5,227,409	July 13, 1993
Garland	5,266,390	Nov. 30, 1993
Reaves	5,368,912	Nov. 29, 1994
Wilson	5,443,885	Aug. 22, 1995
Trosper et al. (Trosper)	5,761,853	June 9, 1998

Appellant's claimed invention is directed to a drop cloth for covering a surface during procedures that spill or splatter material, such as painting. The drop cloth comprises a first layer of non-woven fabric which includes natural fibers or rayon, and a second layer comprising a liquid impervious plastic material, such as polyethylene. The thickness of the first layer is in the range of 1 to 2 mils.

The appealed claims stand rejected under 35 U.S.C. § 103(a) as follows:

(a) claims 1, 3, 7, 8, 10, 15, and 16 over Garland in view of Reaves and Trosper;

(b) claims 6 and 14 over the stated combination of references;

(c) claims 4, 5, 12, and 13 over the stated combination of references; and

(d) claims 9 and 17 over the stated combination of references further in view of Wilson and Mobley.

Appellant submits at page 3 of the principal brief that claims 1 and 9 stand or fall together, as do claims 10 and 17.

We have thoroughly reviewed each of appellant's arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for essentially those reasons expressed in the Answer, and we add the following primarily for emphasis.

Garland, like appellant, discloses a drop cloth comprising a first layer of non-woven fabric material and a second layer having a liquid impervious plastic material. Garland does not disclose that his drop cloth includes natural fibers or rayon in the non-woven fabric; Garland uses spun bonded polypropylene. However, as pointed out by the examiner, Garland, as well as Reaves and Trosper, evidences that it was known in the art to employ natural fibers, such as cotton, in the absorbent layer of a drop cloth. Also, appellant's specification discloses that "drop cloths have been made from sheets of cotton, cotton

blended fabrics, . . .” (page 1, fourth paragraph).

Accordingly, we are convinced that the examiner has properly concluded that it would have been obvious for one of ordinary skill in the art to include natural fibers or rayon in the polypropylene layer of Garland, or to completely substitute natural fibers or rayon for the polypropylene of Garland in the non-woven fabric layer. It must be emphasized that the claims on appeal are sufficiently broad to encompass a non-woven fabric layer including small amounts of natural fibers or rayon and a predominant amount of other fabric material, such as the polypropylene of Garland. Hence, adding only minor amounts of natural fiber or rayon to the polypropylene layer of Garland would meet the requirements of appellant's first layer of non-woven fabric material. We note that appellant's specification attaches no criticality to the particular natural fiber used.

A main argument advanced by appellant is that Garland does not teach a thickness for the non-woven fabric layer in the claimed range of 1 to 2 mils. Garland describes the thickness of the non-woven layer as in the range of 0.005 to 0.002 mils. However, the examiner has submitted extensive calculations to demonstrate that the disclosed thickness of Garland's non-woven layer is an obvious error, and that the non-woven layer of

Appeal No. 2006-1309
Application No. 09/166,625

Garland actually "has a thickness of 0.0005 - 0.002 inches or 0.5 - 2 mils" (page 11 of Answer, first paragraph). In response, appellant has not refuted the examiner's calculations by pointing to any error therein but has simply offered a bald challenge to the calculations (see page 2 of Reply Brief, second paragraph). Accordingly, we will accept the examiner's calculations as reasonable. Furthermore, it should be quite clear that a layer of a drop cloth cannot realistically have a thickness of 0.0005 mils, which is on the order of microns. In addition, it is well settled that where patentability is predicated upon a change in a condition of a prior art composition, such as a change in size, concentration or the like, the burden is on the applicant to establish with objective evidence that the change is critical, i.e., it leads to a new, unexpected result. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990); In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). In the present case, appellant has not attached any criticality to the claimed thickness, and the disclosed preference for the claimed thickness would seem to allay any suggestion of criticality (see page 10 of specification, second paragraph).

Appeal No. 2006-1309
Application No. 09/166,625

Concerning the oriented fibers of claim 4 and the randomly oriented fibers of claim 5, we agree with the examiner that it would have been obvious for one of ordinary skill in the art to select either one of these two possible orientations contingent upon the particular physical properties of the layer desired. We concur with the examiner that since Garland does not require either orientation for the non-woven fibers, it is reasonable to presume that the reference would have suggested the use of either well-known orientation to one of ordinary skill in the art. Appellant's specification teaches no criticality for either orientation.

Regarding the claim 6 requirement that the synthetic fibers of the non-woven material are fused together, appellant has not properly challenged the examiner's official notice that "it is well known in the art to employ a blend of synthetic thermoplastic fibers and cellulosic fibers to produce a strong nonwoven fabric being bonded by said thermoplastic fibers and to enhance the ability of the nonwoven [fabric] to bond to other thermoplastic materials" (page 6 of Answer, second paragraph). Appellant again only offers a bald challenge to the examiner's finding without presenting the requisite information or argument that creates, on its face, a reasonable doubt regarding the

Appeal No. 2006-1309
Application No. 09/166,625

validity of the examiner's finding. In re Boon, 439 F.2d 724, 727, 169 USPQ 231, 234 (CCPA 1971). Indeed, rather than asserting that it is novel to fuse synthetic fibers in a non-woven fabric material, or presenting reasons why it would have been unobvious to do so in the non-woven fabric material of Garland, appellant's specification expressly discloses that "[t]he non-woven top layer 16 can include individual fiber filaments which may be heat fused together by using known manufacturing techniques which relate to the temperature and pressure of the process" (page 11 of specification, second paragraph).

For the remaining separately argued claims, we adopt the reasoning set forth in the Examiner's Answer. We note that, for the most part, appellant's arguments are based on the claimed features discussed above.

As a final point, we note that appellant bases no argument upon objective evidence of nonobviousness, such as unexpected results, which would serve to rebut the prima facie case of obviousness established by the examiner.

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

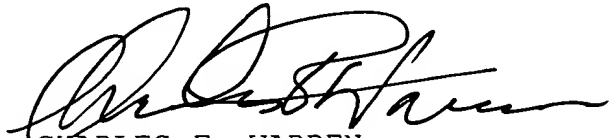
Appeal No. 2006-1309
Application No. 09/166,625

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective Sep. 13, 2004; 69 Fed. Reg. 49960 (Aug. 12, 2004); 1286 Off. Gaz. Pat. Office 21 (Sep. 7, 2004)).

AFFIRMED



EDWARD C. KIMLIN)
Administrative Patent Judge)



CHARLES F. WARREN)
Administrative Patent Judge)

BOARD OF PATENT
APPEALS AND
INTERFERENCES



THOMAS A. WALTZ)
Administrative Patent Judge)

ECK:clm

Appeal No. 2006-1309
Application No. 09/166,625

Barnes and Thornburg
11 South Meridian
Indianapolis, IN 46204